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in the Supreme Court of the United States

OCTOBER TERM, 1994

TERRENCE HALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ERRONEOUSLY DECIDED THE IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW REGARDING THE APPLICABILITY OF THE "COMMERCIAL CURTILAGE" CONCEPT WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

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PREFACE

The following references will be used by Petitioner:

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OPINION BELOW

The Opinion of the United States Court of Appeals, Eleventh Circuit, No. 93-4456, in this cause is reprinted in the Appendix to this Petition at App. 1. The case is reported at 47 F.3d 1091 (11th Cir. 1995).

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered March 16, 1995. Title 28 U.S.C. § 1254(1) is the statutory provision which confers jurisdiction on this Court to review the appellate decision in question.

CONSTITUTIONAL PROVISIONS

The issue herein concerns the Fourth Amendment to the United States Constitution:

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Course of Proceedings

On August 27, 1990, a grand jury for the Southern District of Florida returned a fourteen-count Indictment charging Petitioner, two other individuals, and two corporations (one of which was Bet-Air, Inc.) with one count of conspiracy in violation of 18 U.S.C. § 371, eleven counts of false statement in an export control document, and two counts of illegal exportation of defense articles. (R.E. 7-28).

On March 29, 1991, Petitioner filed his Motion to Suppress Tangible Evidence. The Government conceded that the Petitioner (who was Chairman of the Board of Bet-Air, Inc.) had standing to object to a violation of Bet-Air's Fourth Amendment rights. (Tr. 2:3). Specifically, Petitioner sought to suppress all tangible evidence obtained by United States Customs during a warrantless search of a garbage dumpster located on Bet-Air's property on July 3, 1989, and all evidence seized during a search pursuant to a warrant of the Bet-Air premises on July 7, 1989. The warrant for the latter search was based on certain documents, recovered from the earlier warrantless search, which had been shredded, placed in a green bag, then deposited inside a garbage dumpster located within Bet-Air's commercial curtilage, forty (40) yards inside Bet-Air's private property.

Following a hearing on the Motion to Suppress, the Magistrate Judge issued a Report and Recommendation recommending that the Motion to Suppress be denied (R.E. 35-37). On August 26, 1991, the District Court issued its Order adopting the Magistrate Judge's Report and Recommendation. (R.E. 29-30).

Trial by jury commenced on January 26, 1993. (Tr. 4:1). On February 3, 1993, Petitioner was found guilty on all counts of the Indictment. (R.E. 31-32).

B. Facts

On June 27, 1989, United States Customs Special Agent William Parks met with Assistant United States Attorney Eric A. Dubelier and two attorneys then representing Bet-Air to discuss compliance with a Grand Jury subpoena. It was agreed that Bet-Air would

voluntarily supply the Government with its "corporate minutes" within ten (10) days.

On July 3, 1989, (six days later), Agent Parks entered on Bet-Air's private property (Bet-Air was closed that day). The Agent traversed approximately forty (40) yards into Bet-Air's commercial curtilage before reaching the dumpster, in which he discovered a green bag containing shredded documents. Two Bet-Air employees testified that shredding documents was a routine practice at Bet-Air. Agent Parks reconstructed the shreddings. One of the shredded documents was titled "British Airways — Bet-Air, Inc., Minutes of Meeting."

On July 5, 1989, Agent Parks met with Bet-Air's new attorney who provided Parks with the Bet-Air corporate minutes previously requested. These documents did not include the minutes from the "British Airways — Bet-Air meeting." The subpoena had not specifically sought minutes of meetings between Bet-Air and British Airways and/or any other third parties.

Based on his belief that Bet-Air had destroyed subpoenaed business records, Agent Parks obtained a search warrant for Bet-Air's premises. On July 7, 1989, United States Customs executed the search warrant upon Bet-Air and seized numerous documents and records from the premises. The admission, over objection, of this evidence at trial greatly prejudiced Petitioner and constituted a violation of his Fourth Amendment rights.

REASONS FOR GRANTING THE WRIT

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ERRONEOUSLY DECIDED THE IMPORTANT

QUESTION OF FEDERAL CONSTITUTIONAL LAW REGARDING THE APPLICABILITY OF THE "COMMERCIAL CURTILAGE" CONCEPT WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal constitutional law which has not been, but should be, settled by this Court.

The Court of Appeals recognized that: "The Supreme Court has not squarely addressed the applicability of the common law concept of curtilage to commercial property." (App. 12). The Court of Appeals then surmised that: "Given the [Supreme] Court's view of the relationship between the Fourth Amendment and commercial premises, however, we have little doubt that were the [Supreme] Court to embrace the so-called 'business curtilage' concept, it would, at a minimum, require that the commercial proprietor take affirmative steps to exclude the public." (App. 12).

After noting the absence of this Court's precedent, the Court of Appeals then undertook to presume how this Court would apply the federal constitutional law and held the "business curtilage" concept did not apply *sub judice* because Bet-Air failed to affirmatively exclude the public from the area immediately surrounding its offices. (App. 12). Thus, the Court of Appeals determined, Agent Parks' warrantless search did not infringe upon any societal values protected by the Fourth Amendment. (App. 13). Accordingly, the Court of Appeals held that Bet-Air's subjective expectation of privacy was not one that society is prepared to accept as objectively reasonable under *Greenwood v. California*, 486 U.S. 35, 108 S.Ct. 1625 (1988). (App. 13).

The law is clear that a business enjoys a reasonable expectation of privacy in its commercial curtilage and that warrantless searches of this area are prohibited by the Fourth Amendment.[1] *Dow Chemical v. United States*, 476 U.S. 227, 106 S.Ct. 1819 (1988); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987); *United States v. Swart*, 679 F.2d 698 (7th Cir. 1982).

This Court recognized that the Fourth Amendment not only protects a person and his/her home from an unreasonable search, but also "**[a] person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.**" *Rakas v. Illinois*, 439 U.S. 128, 142, 99 S.Ct. 421, 430 (1978) [emphasis added].

"[T]he proper focus under *Greenwood* is whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable." *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991). *Sub judice*, to discover the shredded documents inside the sealed green bag in the dumpster, Agent Parks entered Bet-Air's private property[2] and travelled inside its property approximately forty (40) yards before reaching the dumpster. The Eleventh Circuit acknowledged those facts and that the garbage was situated in "the area immediately surrounding" Bet-Air's private property, but held that the probative value of same was substantially

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[1]*Sub judice*, all evidence seized from the unconstitutional search must be suppressed as fruits of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

[2]Agent Parks' warrantless search was conducted on a legal holiday, July 3, 1989, when he knew Bet-Air was closed for business. As in *Swart*, the warrantless search here was conducted on Bet-Air's "outside business premises that were closed for the day." *Swart*, 679 F.2d at 702.

attenuated due to the lack of evidence proving Bet-Air took steps to exclude the public. (App. 10).

In fact, the contrary is true: the documents were shredded; placed in a green bag; the bag was sealed; and then the sealed bag was placed in the dumpster located on Bet-Air's private property. The garbage was not accessible to the public. Bet-Air took clear and sufficient affirmative steps to restrict the public's access to the discarded garbage. Accordingly, Petitioner's subjective expectation of privacy is one that society should be prepared to accept as objectively reasonable.

This Court has held that a warrant is necessary for a search of the portions of commercial premises which are not open to the public. *See v. City of Seattle*, 387 U.S. 541, 545, 87 S.Ct. 1737, 1740 (1967). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.* at 1739.

Moreover, "[g]overnment agents cannot attempt to justify a warrantless search on a claim of a reduced expectation of privacy on business premises when the agents do not see the items as a customer would ordinarily see them." *Swart*, 679 F.2d at 701 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2325 (1979)). Certainly, no customer would ordinarily retrieve and reassemble shredded documents from a sealed bag in Bet-Air's garbage dumpster.

Bet-Air exercised reasonable affirmative measures to exclude public access to the garbage contained within its commercial curtilage. Thus, a **shredded document in a green bag located in a garbage dumpster that is at least forty (40) yards within Bet-Air's private**

property (on which the general public is not invited), on a day the business was closed, clearly gives rise to a subjective expectation of privacy that society is, or should be, prepared to accept as objectively reasonable. The Court of Appeals erred in finding that Petitioner did not possess a reasonable expectation of privacy under these circumstances.

CONCLUSION

Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution and seeks relief in this Court to restore those rights. This issue is clearly capable of repetition. Based on the arguments and authorities cited herein, Petitioner, Terrence Hall, respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, reverse the Petitioner's convictions, and for such other relief as is just and proper.

Respectfully submitted,
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